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Your own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by FRONTEX of its fundamental rights obligations

Dear Professor Diamandouros:

The Jesuit Refugee Service (JRS) is a global non-governmental organisation with a mission to accompany, serve and advocate for refugees and the forcibly displaced. In Europe, JRS offices are present in 14 countries. We are closely monitoring the situation at the external borders of the European Union and in the neighbouring countries, and actively advocating for the human rights of migrants and refugees being respected and fulfilled in the context of border controls. Last year, JRS Europe has been deeply involved in the discussion on Regulation 1168/2011/EU that amended Council Regulation (EC) 2004/2007 (hereinafter referred to as “the Regulation”).

It is against this background that we warmly welcome your own-initiative inquiry because you have raised very important questions that must be urgently discussed. We are also thankful to you for making public your inquiry and FRONTEX’s reply and for inviting civil society actors to give their feedback. We would like to submit some comments on the Agency’s answers to your questions.

To begin with, we may recall the European Court of Human Rights (Grand Chamber) judgment of 23 February 2012 in the case of *Hirsi Jamaa And Others v. Italy* (application no. 27765/09), where the Court unanimously held that “Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.” (§ 74).

This principle is, *mutatis mutandis*, applicable to FRONTEX as well. As a body of the Union the Agency enjoys some autonomy and is not just the vicarious agent of one or more member states. Thus FRONTEX a fortiori bears responsibility for the respect of human rights throughout all operations it is involved in. This is reflected in the amended Article 1(2) of the Regulation and is applicable to all activities within and outside the European Union's territory. In order to avoid violation of human rights, including the non-refoulement principle, FRONTEX is in particular obliged to ensure that in cases of interception persons claiming to be or evidently being in need of protection (be it refugee or subsidiary protection) are identified and given access to fair determination procedures.

Accordingly and in contrast to FRONTEX's reply to your question 1 (iii), the reference to "**all activities**" in Article 26a(1) of the Regulation concerns any and all operations where FRONTEX is involved, not only where the Agency has a leading or coordinating role. The monitoring mechanism that the second sentence in Article 26a(1) is calling for must cover the entirety of FRONTEX's human rights sensitive acting.

As FRONTEX has pointed out in their reply to your question 1 (i) a Fundamental Rights Strategy has been adopted. It does contain many laudable elements but not effective monitoring or complaints mechanisms. It should also be noted that the Strategy and the Action Plan were developed without any involvement of relevant non-governmental organisations, be it human rights or refugee/migrant organisations.

We would like to emphasise that Article 26a(1) demands the **monitoring mechanism** to be *effective*. The "interaction" of several mechanisms that FRONTEX referred to in their answer to your question 1 (ii) is far from meeting this criterion. Most notably, there is still no mechanism set in place that would ensure compliance with the non-refoulement principle and proper identification of persons in need of protection. In the context of the termination of joint operations and pilot projects, FRONTEX's procedures for the identification of rights violations (your question 5 (i)) do completely fail to consider the human rights situation in the countries of transit where intercepted migrants might be returned to. We know from first-hand experience that, for instance, irregular migrants in Morocco who have been returned to this country face a disastrous situation in destitution without any assistance from the Moroccan state. They are continuously in danger of being victims to round-ups and deportations to the desert at the border to Algeria. Similar conditions prevail in Algeria. Amnesty International has reported continuous human rights violations committed against migrants and asylum seekers in Libya. Interception followed by return to such a country of transit therefore triggers the danger of considerable human rights violations. But there is no mechanism in place ensuring that these dangers are properly taken into consideration.

Also the **complaints mechanisms** (see your questions 1 (iv), 3 (ii) and 5 (ii)) are far from being effective. Most notably the answer to your question 1 (iv), while being formally correct, clearly describes the "organised irresponsibility": Every actor in an operation claims to be not responsible, therefore in reality the human rights safeguards are completely ineffective. "Internal mechanisms" are not sufficient for solving this problem. Instead there should be developed a mechanism that allows an intercepted or returned person to approach with a complaint a Fundamental Rights or other FRONTEX officer on scene who should have the power to stop the execution of an operation or at least halt it until there is a final decision by the Executive Director.

The lack of efficient complaints and monitoring procedures is, again, highlighted by the fact that FRONTEX still has to amend its **Codes of Conduct** in order to meet the requirements of the 2nd sentence in Article 2a of the Regulation (cf. the answer to your question 2 (i)). Also, FRONTEX has for years coordinated Joint Return Operations. It is somehow astonishing to learn from the reply to your question 2 (ii) that a specific Code of Conduct for this special type of operations has still to be developed.

With regard to the **Fundamental Rights Officer** (your questions 3 (i)-(iii)) it should be recalled that Regulation (EU) No 1168/2011 dates of 25 October 2011 and entered into force mid-December 2011. It is somehow astonishing that only about five months later, a vacancy notice for the position of the Fundamental Rights Officer (FRO) was published and that the Agency's decision-making bodies still have to work out the details of this officer's role. The position is envisaged to be filled only by end of 2012, i.e. about one year later! This is not a speedy implementation of the relevant provisions of the Regulation, which is the more worrisome given the massive human rights problems occurring in the context of the border control operations.

Also astonishing is that, according to FRONTEX's statement, the EU-Fundamental Rights Agency, the very Union expert body on human rights, was not involved in the drafting of the FRO's job description but only, at a later stage, in the discussion on the Consultative Forum. Neither was any non-governmental organisation nor the UNHCR invited to assist with their expertise. It is, therefore, hardly surprising that the Officer's tasks as listed in the reply are rather vague and unspecific. Also the division of competences between the FRO and the Coordinating Officer of a European Border Guard Team still must be defined. There should be, for instance, a clear obligation of each and every person who participates at a FRONTEX operation to report to the Fundamental Rights Officer any issues that relate to human rights, and to answer all questions posed by the FRO to him or her.

In order to complete and update the statement about the **Consultative Forum** we would like to inform you that a "Preliminary Meeting" of this body has been scheduled by FRONTEX for September 5, 2012. Invited are Amnesty International European Institutions Office, Caritas Europa, Churches' Commission for Migrants in Europe, Council of Europe, European Asylum Support Office, European Council for Refugees and Exiles, European Union Agency for Fundamental Rights, International Catholic Migration Commission, International Commission of Jurists, International Organization for Migration, Jesuit Refugee Service Europe, Organization for Security and Co-operation in Europe, Platform for International Cooperation on Undocumented Migrants, Red Cross EU Office, and the United Nations High Commissioner for Refugees.

We hope that these comments are helpful for your inquiry, and are at your disposal for any further discussion of this topic.

Respectfully yours,

Stefan Keßler
Policy & Advocacy Officer